

1 **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**
2 **OF THE STATE OF MONTANA**

3 In the matter of the adoption) **PRESIDING OFFICER REPORT**
4 of NEW Rules I through XVIII,)
5 the amendment of 17.8.101,)
6 17.8.110, 17.8.309, 17.8.310,)
7 17.8.316, 17.8.342, 17.8.818,)
8 17.8.825, 17.8.826, 17.8.901,)
9 17.8.904, 17.8.905, 17.8.906,)
10 17.8.1004, 17.8.1005,)
11 17.8.1106, 17.8.1109,)
12 17.8.1201, 17.8.1204,)
13 17. 8. 1205, 17.8.1220,)
14 17.8.1224, and 17.8.1226, and)
15 the repeal of 17.8.701,)
16 17.8.702, 17.8.704, through)
17 17.8.707, 17.8.710, 17.8.715)
18 through 17.8.717, 17.8.734)
19 pertaining to the issuance of)
20 Montana air quality permits)
21 and repeal of ARM Title)
22 17, chapter 8, subchapter 7)
23 pertaining to the issuance of)
24 Montana air quality permits)

15 **INTRODUCTION**

17 1. On October 10, 2002, I presided over and conducted
18 the public hearing held in Room 111 of the Metcalf Building,
19 1520 East Sixth Avenue, Helena, Montana, to take public
20 comment on the above-captioned matter. Notice of the hearing
21 was contained in 2002 Montana Administrative Register (MAR)
22 No. 15, MAR Notice No. 17-165, published on August 15, 2002.
23 A copy of the notice is attached to this report.

24 2. The hearing began at about 10:30 a.m. and concluded
25 at about 11:20 a.m. A court reporter, Rosi E. Christensen,
26 recorded the hearing.

1 3. I announced that persons at the hearing would be
2 given an opportunity to submit their data, views, or
3 arguments concerning the proposed action, either orally or in
4 writing. Written comments received at the hearing and
5 afterward during the public comment period are attached to
6 this report.

7 4. At the hearing I identified and summarized the MAR
8 notice, stated that copies of the MAR notice were available
9 in the hearing room, read the Notice of Function of
10 Administrative Rule Review Committee as required by Mont.
11 Code Ann. § 2-4-302(7)(a), informed the persons at the
12 hearing of the rulemaking interested persons list and of the
13 opportunity to have their names placed on that list, recited
14 the authority to make the proposed rulemaking, announced the
15 opportunity to present matters at the hearing or in writing,
16 as stated in the MAR notice, and explained the order of
17 presentation.

18 5. At the conclusion of the hearing, I announced that
19 the proposed rulemaking was expected to be considered by the
20 Board at its meeting on December 6, 2002.

21 **SUMMARY OF HEARING**

22 6. Charles Homer, Supervisor, Technical Support
23 Section, Air and Waste Management Bureau, DEQ, made a
24 statement in support of the proposed rulemaking and also
25 submitted written materials: his written statement (which
26 was substantially the same as his oral statement at the
27 hearing), DEQ's proposed changes to the noticed rulemaking,

1 and a memorandum from David Rusoff, DEQ Deputy Chief Legal
2 Counsel, with HB 521 Review and HB 311 Review and Private
3 Property Assessment Act Checklist. Because of the length and
4 complexity of these extensive comments, I shall provide only
5 a brief summary.

6 a. Mr. Homer explained that a working group had
7 held numerous meetings during the past several years to
8 revise the air quality minor source permitting rules. Notice
9 of proposed rulemaking was published in February 2002, and
10 the public hearing was held in March 2002. At its June
11 meeting, the Board decided to re-initiate rulemaking to allow
12 consideration of comments it had received, and at its July
13 meeting it approved publication of the notice that is the
14 subject of this hearing. Many of the proposed rules are
15 intended to make the rules easier to read, understand, and
16 follow. In addition, there are various substantive changes.

17 b. DEQ opposes New Rule I, the statement of
18 purpose.

19 c. DEQ is concerned that New Rule III, which
20 allows certain limited construction prior to issuance of a
21 permit, may endanger approval of the program by EPA.

22 d. In New Rule IV, DEQ opposes some of the
23 language pertaining to emergency equipment.

24 e. In New Rule VII(4), DEQ supports deleting the
25 words "does not operate or" to make clear that past
26 compliance is not used in permitting decisions.

27

1 f. DEQ opposes language in New Rule XIV
2 pertaining to partial permit revocation

3 7. Charles Hansberry of Holland & Hart Law Firm,
4 representing several businesses including Exxon Mobil Corp,
5 Stone Container, Holcim, Inc., Louisiana-Pacific, Stillwater
6 Mining, and Holly Sugar, made a statement as a proponent of
7 the proposed rulemaking, but with some changes. He expressed
8 frustration with the lack of input from EPA until the last
9 moment.

10 a. His clients support New Rule I, which is
11 important to show the thought process underlying the rules.

12 b. Industry agrees with DEQ that the words "does
13 not operate or" should be deleted from New Rule VII(4), to
14 clarify the separation of permitting and enforcement.
15 Permitting looks to future compliance and enforcement actions
16 look to past compliance.

17 c. His clients disagree with EPA's criticism of
18 New Rule III allowing some construction before permit
19 approval. The proposal does not apply where PSD or NSR rules
20 apply. DEQ has the authority to halt construction if
21 problems arise. Montana has been waiting for years for EPA
22 to take some action on a national level, but EPA has not
23 acted and probably will not act because this is an issue in
24 cold weather states, not nationwide. Several other states
25 allow pre-permit construction. While New Rule III is not the
26 same as the rule in any of these states, the limited
27 construction it allows at the applicant's risk should be

1 approved. Mr. Hansberry submitted a two-page document
2 describing the various pre-permit construction rules of seven
3 other states.

4 d. His clients disagree with EPA's criticism of
5 New Rule V pertaining to de minimis changes.

6 e. EPA's criticism of the 15-day period for
7 public review of preliminary determinations on permits is not
8 based on any federal statute. The short period is needed in
9 order to meet the 60-day period provided by Montana law for
10 acting on permits.

11 f. Industry supports the inclusion of the
12 definition of "Routine maintenance, repair, or replacement"
13 in New Rule II, despite EPA's criticism.

14 g. His clients disagree with EPA's criticism of
15 "state-only" conditions in Montana Air Quality Permits, which
16 are allowed by New Rule VII(5).

17 8. Michael Kakuk, representing Montana Contractors'
18 Association, generally agrees with the comments made by Mr.
19 Hansberry, but requested an extension of time until
20 October 21, 2002, to provide written comments because EPA did
21 not submit its extensive comments until October 9. I granted
22 this request.

23 **SUMMARY OF WRITTEN MATERIALS**

24 9. The written testimony of Charles Homer, DEQ, and
25 DEQ's proposed amendments to the rules describe changes
26 proposed by DEQ and the reasons for these changes.

27

1 10. David Rusoff, DEQ Deputy Chief Legal Counsel,
2 prepared a written review of HB 521 and HB 311 (Private
3 Property Assessment Act) for the proposed rulemaking.

4 a. HB 521 does not appear to apply to procedural
5 rules. Most of the proposed rules are procedural. New Rule
6 VIII would impose the same substantive requirements contained
7 in a current state rule. There are no federal regulations
8 comparable to the State's minor source pre-construction
9 permit rules. HB 521 applies only when there is a comparable
10 federal regulation or guideline. Therefore, no further HB
11 521 analysis is required.

12 b. HB 311 requires the state to assess the taking
13 or damaging implications of a proposed rule. The proposed
14 rule affects private real property. A Private Property
15 Assessment Act Checklist was prepared, which shows that the
16 proposed rule does not have taking or damaging implications.
17 Therefore, no further HB 311 assessment is required.

18 11. Mr. Hansberry submitted a document describing pre-
19 permit construction rules in seven other states.

20 12. The United States EPA, Region VIII, submitted 35
21 pages of comments by facsimile on October 9, 2002. Several
22 of the comments identify provisions in the proposed New Rules
23 that EPA believes it cannot approve into the SIP. Because of
24 the detail and length of the comments, I will not further
25 summarize them. However, I note that the editorial
26 corrections suggested by EPA have been made in DEQ's proposed
27 amendments to the rulemaking, which Mr. Homer submitted.

1 13. On October 17, 2002, Don Allen, Executive Director,
2 Western Environmental Trade Association (WETA), submitted
3 written comments. These comments addressed both the position
4 of DEQ and the position of EPA. WETA supports the purpose
5 statement in New Rule I and the limited construction that is
6 allowed prior to the issuance of a permit by New Rule III.
7 WETA strongly disagrees with EPA's comments about the de
8 minimus rule [New Rule V]. WETA noted that the proposed
9 rules were worked on by a task force over a period of two
10 years, but EPA submitted its comments the day before the
11 hearing, which forced DEQ and interested parties to respond
12 to the EPA comments at the last minute. WETA concluded,
13 "Hopefully, the Board will make a statement expressing to the
14 EPA the importance of becoming involved earlier in the
15 process that Montana has established."

16 14. Charles Hansberry, Attorney with the Holland & Hart
17 Law Firm, submitted written comments on behalf of Smurfit-
18 Stone Container, Exxon Mobil Corp., Holcim USA Inc.,
19 Louisiana Pacific Corp., Stillwater Mining Co., and
20 Imperial/Holly Sugar. I will briefly summarize these
21 extensive comments. His clients generally support adoption
22 of the proposed rules and oppose the suggestions of DEQ and
23 EPA.

24 a. His clients support the removal of language
25 from New Rule VII(4) and New Rule IV(f), as also suggested by
26 DEQ.

27

1 b. His clients oppose other changes suggested by
2 DEQ. New Rule I should be retained. The limited pre-
3 construction allowed by New Rule III should be retained.

4 c. His clients oppose changes requested by EPA,
5 such as changes in the de minimis rule (New Rule V), changes
6 in state-only rules (New Rule VII(5)), and a public comment
7 period in excess of 15 days (New Rule XI(4)(b)).

8 d. Mr. Hansberry expressed frustration with
9 Region 8, EPA providing comments at the last minute and
10 opposing a rule where it has approved a very similar rule in
11 another state.

12 15. Mr. Michael Kakuk, attorney for Montana
13 Contractor's Association, submitted a letter in support of
14 the comments made by Mr. Hansberry.

15 16. The Montana Environmental Information Center
16 submitted a letter with many comments, which I shall
17 summarize. In general, MEIC agrees with EPA.

18 a. The 15-day periods for public comment and for
19 filing an appeal of a final decision are insufficient and do
20 not provide an adequate opportunity for public participation.
21 DEQ should inform the legislature that the statutory limit of
22 60 days to review a permit is inadequate.

23 b. MEIC no longer supports the purpose statement.

24 c. Commencing very limited weather-sensitive
25 construction prior to permit approval is not objectionable,
26 but New Rule III(3) imposes an impossible burden on DEQ.
27 MEIC proposes that DEQ be able to order that construction

1 cease if "DEQ has reason to believe the proposed project may
2 result in a violation of the state implementation plan or may
3 interfere with the attainment or maintenance of any federal
4 or state ambient air quality standard."

5 d. MEIC supports New Rule IV(1)(f) as written and
6 has objections to New Rule IV(1)(i).

7 e. MEIC objects to DEQ's proposed changes to New
8 Rule VII(4). The burden should be on the facility, not DEQ,
9 to prove that the emitting unit does operate in compliance.
10 In addition, past compliance problems could indicate the
11 inability to comply in the future.

12 f. MEIC objects to the de minimis rule and
13 supports the changes suggested by EPA.

14 **PRESIDING OFFICER COMMENTS**

15 17. The Board has jurisdiction to adopt, amend, and
16 repeal rules for the administration, implementation, and
17 enforcement of the Clean Air Act of Montana. Mont. Code Ann.
18 § 75-2-111(1). The Board has authority to issue rules
19 relating to construction, installation, alteration,
20 operation, or use of a machine, equipment, device, or
21 facility that may directly or indirectly cause or contribute
22 to air pollution. Mont. Code Ann. §§ 75-2-204, 75-2-211.

23 18. House Bill 521 (1995) generally provides that the
24 Board may not adopt a rule that is more stringent than
25 comparable federal regulations or guidelines, unless the
26 board makes written findings after public hearing and
27 comment. The proposed rules are not more stringent than a

1 comparable federal regulation or guideline. Therefore
2 written findings are not necessary.

3 19. House Bill 311 (1995), the Private Property
4 Assessment Act, codified as Mont. Code Ann. § 2-10-101
5 through -105, provides that a state agency must complete a
6 review and impact assessment prior to taking an action with
7 taking or damaging implications. The proposed rules may
8 affect real property. A Private Property Assessment Act
9 Checklist was prepared in this matter. The proposed rules do
10 not have taking or damaging implications. Therefore, no
11 further HB 311 assessment is necessary.

12 20. The procedures required by the Montana
13 Administrative Procedure Act, including public notice,
14 hearing, and comment, have been followed.

15 21. The Board may adopt the proposed rules, or reject
16 them, or adopt the rules with revisions not exceeding the
17 scope of the public notice.

18 22. Under Mont. Code Ann. § 2-4-305(7), for any acts in
19 the rulemaking process to be valid, the Board must publish a
20 notice of adoption within six months of the date the Board
21 published the notice of proposed rulemaking in the Montana
22 Administrative Register, or by February 11, 2003.

23 Dated this _____ day of October, 2002.
24
25

26 _____
THOMAS G. BOWE
Presiding Officer
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